

8(a) BUSINESS DEVELOPMENT
PROGRAM
COMPLIANCE GUIDE

SMALL BUSINESS SIZE REGULATIONS
8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

2010

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INTRODUCTION

This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—comply with the new rules adopted in the above referenced rulemaking. This Guide is not intended to replace the rules and, therefore, final authority rests solely with the rules. SBA retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be based on the statute and regulations.

In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide may be considered as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages.

Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the SBA will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The SBA may decide to revise this Guide without public notice to reflect changes in the SBA's approach to implementing a rule, or to clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the Office of Business Development, LaTanya Wright; telephone: (202) 205-5852; fax: (202) 481-2076; LaTanya.Wright@SBA.gov.

CONTACT INFORMATION:

United States Small Business Administration
Office of Business Development
409 3rd Street, SW
Washington, DC 20416

OFFICE INFORMATION:

Darryl Hairston, Associate Administrator for Business Development
LeAnn Delaney, Deputy Associate Administrator for Business Development
Robert Watkins, Director, Office of Certification and Eligibility

SUMMARY

On [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] the U.S. Small Business Administration (SBA or Agency) published in the Federal Register a final rule making changes to the regulations governing the section 8(a) Business Development (8(a) BD) program, SBA's size regulations, and the regulations affecting Small Disadvantaged Businesses (SDBs). It is the first comprehensive revision to the 8(a) BD program in more than ten years. Some of the changes involved technical issues such as changing the term "SIC code" to "NAICS code" to reflect the national conversion to the North American Industry Classification System (NAICS). Other changes were more substantive and the result of SBA's experience in implementing the current regulations. In addition, SBA made changes in response to comments received to its notice of proposed rulemaking 74 Fed. Reg. 55694. SBA has learned through experience that certain of its rules governing the 8(a) BD program are too restrictive and serve to unfairly preclude firms from being admitted to the program. In other cases, SBA determined that a rule is too expansive or indefinite and sought to restrict or clarify those rules. In one case, SBA made wording changes to correct past public or agency misinterpretation. Additionally, this rule makes changes to address situations that were not contemplated when the previous revisions to the 8(a) BD program were made.

DATES: Effective Date: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

AUTHORITY

Part 121 – Small Business Size Regulations; Subpart A – Size Eligibility Provisions and Standards Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644 and 662(5); and, Pub. L. 105-135, sec. 401 et seq., 111 Stat. 2592.

Part 124--8(A) Business Development/Small Disadvantaged Business Status Determinations; Subpart A – 8(a) Business Development Authority: 15 U.S.C. 634(B)(6), 636(J), 637(A), 637(D) And Pub. L. 99-661, Pub. L. 100-656, Sec. 1207, Pub. L. 101-37, Pub. L. 101-574, Section 8021, Pub. L. 108-87, And 42 U.S.C. 9815.

AFFILIATION

CURRENT RULE: § 121.103(b)(3) and (b)(6)

Business concerns which are part of an SBA approved pool of concerns for a joint program of research and development as authorized by the Small Business Act are not affiliates of one another because of the pool.

A protégé firm is not an affiliate of a mentor firm solely because the protégé firm receives assistance from the mentor firm under Federal Mentor-Protégé programs. Affiliation may be found for other reasons.

PROPOSED RULE:

§ 121.103(b) was not entirely consistent with the statutory authority regarding exclusions from affiliation for certain types of small business pools. Words “or for defense production” were inadvertently omitted after the words “joint program of research and development.”

Clarified when SBA would consider a protégé firm not to be affiliated with its mentor based on assistance received from the mentor through a mentor/protégé agreement. In practice, the former regulation was at times misconstrued by other Federal agencies which believed that they could establish mentor/protégé programs and exempt protégés from SBA’s size affiliation rules on their own. That was never SBA’s intent.

Clarified that an exception to affiliation for protégés in other Federal mentor/protégé programs will be recognized by SBA only where specifically authorized by statute or where the agency asks for and SBA grants such an exclusion.

FINAL:

In determining affiliation SBA considers business concerns which are part of an SBA approved pool of concerns for a joint program of research and development or for defense production as authorized by the Small Business Act are not to be affiliates of one another because of the pool.

An 8(a) BD Participant that has an SBA-approved mentor/protégé agreement is not affiliated with a mentor firm solely because the protégé firm receives assistance from the mentor under the agreement. Similarly, a protégé firm is not affiliated with its mentor solely because the protégé firm receives assistance from the mentor under a Federal Mentor-Protégé program where an exception to affiliation is specifically authorized by statute or by SBA under the procedures set forth in § 121.903. Affiliation may be found in either case for other reasons.

JOINT VENTURES

CURRENT RULE: § 121.103(h)

Current regulation limits a specific joint venture to submitting no more than three offers over a two year period.

PROPOSED RULE:

Changed requirement to allow a specific joint venture to be awarded three *contracts* over a two year period. Clarified that the partners to a joint venture could form a second joint venture and be awarded three additional contracts, and a third joint venture to be awarded three more.

FINAL:

A joint venture is an association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture entity generally may not be awarded more than three contracts over a two year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for all purposes.

Once a joint venture receives one contract, SBA will determine compliance with the three awards in two years rule for future awards as of the date of initial offer including price. As such, an individual joint venture may be awarded more than three contracts without SBA finding general affiliation between the joint venture partners where the joint venture had received two or fewer contracts as of the date it submitted one or more additional offers which thereafter result in one or more additional contract awards. The same two (or more) entities may create additional joint ventures, and each new joint venture entity may be awarded up to three contracts in accordance with this section. At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them. For purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture, a joint venture must be in writing and must do business under its own name, and it may (but need not) be in the form of a separate legal entity, and if it is a separate legal entity it may (but need not) be populated (i.e., have its own separate employees). SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists.

Example 1

Joint Venture AB has received two contracts. On April 2, Joint Venture AB submits an offer for Solicitation 1. On June 6, Joint Venture AB submits an offer for Solicitation 2. On July 13, Joint Venture AB submits an offer for Solicitation 3. In September, Joint Venture AB is found to be the apparent successful offeror for all three solicitations. Even though the award of the three contracts would give Joint Venture AB a total of five contract awards, it could receive those awards without causing general affiliation between its joint venture partners because Joint Venture AB had not yet received three contract awards as of the dates of the offers for each of three solicitations at issue.

Example 2

Joint Venture XY receives a contract on December 19, year 1. It may receive two additional contracts through December 19, year 3. On August 6, year 2, XY receives a second contract. It receives no other contract awards through December 19, year 3 and has submitted no additional offers prior to December 19, year 3. Because two years have passed since the date of the first

contract award, after December 19, year 3, XY cannot receive an additional contract award. The individual parties to XY must form a new joint venture if they want to seek and be awarded additional contracts as a joint venture.

Example 3

Joint Venture XY receives a contract on December 19, year 1. On August 6, year 2, XY receives a second contract. On December 15, year 3, XY submits an offer for Solicitation 1. In January, Joint Venture XY is found to be the apparent successful offeror for Solicitation 1. Because XY submitted its offer prior to December 19, year 3, it is eligible for the contract award, since compliance with the three awards in two years rule is determined as of the date of the initial offer including price.

Two firms approved by SBA to be a mentor and protégé under §124.520 may joint venture as a small business for *any* Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in § 124.519.

If the procurement is to be awarded through the 8(a) BD program, SBA must approve the joint venture pursuant to § 124.513.

If the procurement is to be awarded other than through the 8(a) BD program (e.g., small business set aside, HUBZone set aside), SBA need not approve the joint venture prior to award, but if the size status of the joint venture is protested, the provisions of §§ 124.513(c) and (d) will apply. This means that the joint venture must meet the requirements of §§ 124.513(c) and (d) in order to receive the exception to affiliation authorized by this paragraph.

In either case, after contract performance is complete, the 8(a) partner to the joint venture must submit a report to its servicing SBA district office explaining how the applicable performance of work requirements were met for the contract.

CURRENT RULE: §§ 121.103 & 124.513

PROPOSED RULE:

Clarified SBA's longstanding policy that a joint venture may or may not be populated (i.e., have its own separate employees). If a joint venture is a separate legal entity, SBA thought that it must have its own employees. If a joint venture merely exists through a written agreement between two or more individual business entities, then SBA felt that it need not have its own separate employees and employees of each of the individual business entities may perform work for the joint venture.

FINAL:

Clarifies that a populated joint venture is joint venture formed as a separate legal entity that has its own separate employees and clarifies the requirements contained in § 124.513(d). Also, provides for separate regulatory requirements for populated and unpopulated joint venture.

Unpopulated

The joint venture must designate an employee of the 8(a) managing venturer as the project manager responsible for performance of the contract.

Populated

A populated joint venture is joint venture formed as a separate legal entity that has its own separate employees and must demonstrate that performance of the contract is controlled by the 8(a) managing venture.

CLASSIFICATION OF A PROCUREMENT FOR SUPPLIES

CURRENT RULE: § 121.402

PROPOSED RULE:

Clarify that a procurement for supplies must be classified under the appropriate manufacturing NAICS code, not under a wholesale trade NAICS code or a retail trade code.

FINAL:

Acquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code, not under a wholesale trade or retail trade NAICS code. A concern that submits an offer or quote for a contract where the NAICS code assigned to the contract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it meets the requirements set forth in § 121.406(b).

APPLICATION OF THE NON-MANUFACTURER RULE

CURRENT RULE: § 121.406

PROPOSED RULE:

Clarify the nonmanufacturer rule applies only where the procuring agency has classified a procurement as a manufacturing procurement by assigning the procurement a NAICS code under Sectors 31-33 (e.g., it does not apply to agricultural commodities where there is no processing involved).

FINAL:

A small business concern is qualified to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business set-aside, WOSB or EDWOSB set-aside, or 8(a) contract when it is the manufacturer or producer of the end item being procured (and the end item must be manufactured or produced in the United States).

Nonmanufacturers

A firm may qualify as a small business concern for a requirement to provide manufactured products or other supply items as a nonmanufacturer if it 1) takes ownership or possession of the

item(s) with its personnel, equipment or facilities in a manner consistent with industry practice; and 2) will supply the end item of a small business manufacturer, processor or producer made in the United States, or obtains a waiver of such requirement.

The nonmanufacturer rule applies only to procurements that have been assigned a manufacturing or supply NAICS code. The nonmanufacturer rule does not apply to contracts that have been assigned a service, construction, or specialty trade construction NAICS code.

The nonmanufacturer rule applies only to the supply component of a requirement classified as a manufacturing or supply contract. If a requirement is classified as a service contract, but also has a supply component, the nonmanufacturer rule does not apply to the supply component of the requirement.

Example 1

A procuring agency seeks to acquire computer integration and maintenance services. Included within that requirement, the agency also seeks to acquire some computer hardware. If the procuring agency determines that the principal nature of the procurement is services and classifies the procurement as a services procurement, the nonmanufacturer rule does not apply to the computer hardware portion of the requirement. This means that while a contractor must meet the applicable performance of work requirement set forth in § 125.6 for the services portion of the contract, the contractor does not have to supply the computer hardware of a small business manufacturer.

Example 2

A procuring agency seeks to acquire computer hardware, as well as computer integration and maintenance services. If the procuring agency determines that the principal nature of the procurement is for supplies and classifies the procurement as a supply procurement, the nonmanufacturer rule applies to the computer hardware portion of the requirement. A firm seeking to qualify as a small business nonmanufacturer must supply the computer hardware manufactured by a small business. Because the requirement is classified as a supply contract, the contractor does not have to meet the performance of work requirement set forth in § 125.6 for the services portion of the contract.

The two waiver possibilities identified in paragraph (b)(5) are called “individual” and “class” waivers respectively, and the procedures for requesting and granting them are contained in § 121.1204.

The ownership or possession requirement provides a necessary safeguard to abuse, this provision is not changed in the final rule.

REQUEST FOR FORMAL SIZE DETERMINATION

CURRENT RULE: § 121.1001(b)

PROPOSED RULE:

Amend regulation to give the SBA’s Inspector General the authority to ask for a formal size determination in connection with investigations and other programmatic reviews. OIG specifically asked for this change. Currently, OIG has to go through the head of the relevant program office to get such a size determination.

FINAL:

The SBA Inspector General may request a formal size determination with respect to any of the programs identified in paragraph (b) of § 121.1001.

COMPLETION OF PROGRAM TERM

CURRENT RULE: §§ 124.2, 124.301 & 124.302

PROPOSED RULE:

Amend current rule to specify that a firm that merely completes its program term is not deemed to “graduate” from the 8(a) program, and use the terms “early graduation” and “graduation” in a way that matches the statutory meaning of those terms.

FINAL:

A Participant receives a program term of nine years from the date of SBA’s approval letter certifying the concern’s admission to the program. The Participant must maintain its program eligibility during its tenure in the program and must inform SBA of any changes that would adversely affect its program eligibility. The nine year program term may be shortened only by termination, early graduation (including voluntary early graduation) or voluntary withdrawal.

Ways a Business May Leave the 8(a) BD Program

A concern participating in the 8(a) BD program may leave the program by any of the following means:

- 1) Expiration of the program term established pursuant to § 124.2;
- 2) Voluntary withdrawal or voluntary early graduation;
- 3) Graduation pursuant to § 124.302;
- 4) Early graduation pursuant to the provisions of §§ 124.302 and 124.304; or
- 5) Termination pursuant to the provisions of §§ 124.303 and 124.304.

Graduation Versus Early Graduation

SBA may graduate a firm from the 8(a) BD program at the expiration of its program term (graduation) or prior to the expiration of its program term (early graduation) where SBA determines that:

- 1) The concern has successfully completed the 8(a) BD program by substantially achieving the targets, objectives, and goals set forth in its business plan, and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program; or
- 2) One or more of the disadvantaged owners upon whom the Participant's eligibility is based are no longer economically disadvantaged.

Criteria for Determining Whether a Participant Has Met Its Goals and Objectives

In determining whether a Participant has substantially achieved the targets, objectives and goals of its business plan and in assessing the overall competitive strength and viability of a Participant, SBA considers the totality of circumstances, including the following factors:

- 1) Degree of sustained profitability;
- 2) Sales trends, including improved ratio of non-8(a) sales to 8(a) sales since program entry;
- 3) Business net worth, financial ratios, working capital, capitalization, and access to credit and capital;
- 4) Current ability to obtain bonding;
- 5) A comparison of the Participant's business and financial profiles with profiles of non-8(a) BD businesses having the same primary four-digit SIC code as the Participant;
- 6) Strength of management experience, capability, and expertise; and
- 7) Ability to operate successfully without 8(a) contracts.

Exceeding the Size Standard Corresponding to the Primary NAICS Code

SBA may graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted during the program, for three successive program years unless the firm is able to demonstrate that it has made attempts and further attempts to move forward in a secondary NAICS code (identified in its business plan) and will change its primary NAICS code accordingly.

DEFINITIONAL CHANGES

CURRENT RULE: § 124.3

PROPOSED DEFINITION CHANGES:

Add a definition of NAICS code, and **Change** the term “SIC code” to “NAICS code” everywhere it appears in part 124, to take into account the replacement of the Standard Industry Classification (SIC) code system with the North American Industry Classification System.

Amend the definition of “primary industry classification” to specifically recognize that a Participant may change its primary industry classification over time.

Add a definition of the term “regularly maintains an office.”

FINAL:

NAICS code means North American Industry Classification System code.

Regularly maintains an office means conducting business activities as an on-going business concern from a fixed location on a daily basis. The best evidence of the regular maintenance of an office is documentation that shows that third parties routinely transact business with a Participant at a location within a particular geographical area. Such evidence includes lease agreements, payroll records, advertisements, bills, correspondence, and evidence that the

Participant has complied with all local requirements concerning registering, licensing, or filing with the State or County where the place of business is located. Although a firm would generally be required to have a license to do business in a particular location in order to “regularly maintain an office” there, the firm would not be required to have an additional construction license or other specific type of license in order to regularly maintain an office.

Primary industry classification means the six digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the 8(a) BD applicant or Participant. The NAICS code designations are described in the North American Industry Classification System book published by the U.S. Office of Management and Budget. SBA utilizes § 121.107 of this chapter in determining a firm’s primary industry classification. A Participant may change its primary industry classification where it can demonstrate to SBA that the majority of its total revenues during a two-year period have evolved from one NAICS code to another.

Where a firm demonstrates that it has changed its primary NAICS code, SBA would consider early graduation only where the Participant exceeds the size standard corresponding to its new primary NAICS code for three successive program years and was unable to demonstrate that it has attempted and is attempting to move to a secondary NAICS code identified in its business plan.

Same or similar line of business means business activities within the same four-digit “Industry Group” of the NAICS Manual as the primary industry classification of the applicant or Participant. The phrase “same business area” is synonymous with this definition.

FEES FOR APPLICANT AND PARTICIPANT REPRESENTATIVES

SBA added a new section § 124.4 to address certain restrictions which apply to fees for applicant and Participant representatives.

The compensation received by any agent or representative of an 8(a) applicant or Participant for assisting the applicant in obtaining 8(a) certification or for assisting the Participant in obtaining 8(a) contracts, or any other assistance to support program participation, must be reasonable in light of the service(s) performed by the agent or representative.

In assisting a Participant obtain one or more 8(a) contracts, an agent or representative cannot receive a fee that is a percentage of the gross contract value.

For good cause, the AA/BD may initiate proceedings to suspend or revoke an agent’s or representative’s privilege to assist applicants obtain 8(a) certification, assist Participants obtain 8(a) contracts, or any other assistance to support program participation. Good cause is defined in § 103.4 of these regulations.

The AA/BD may send a show cause letter requesting the agent or representative to demonstrate why the agent or representative should not be suspended or proposed for revocation, or may immediately send a written notice suspending or proposing revocation, depending upon the

evidence in the administrative record. The notice will include a discussion of the relevant facts and the reason(s) why the AA/BD believes that good cause exists. Unless the AA/BD specifies a different time in the notice, the agent or representative must respond to the notice within 30 days of the date of the notice with any facts or arguments showing why good cause does not exist. The agent or representative may request additional time to respond, which the AA/BD may grant in his or her discretion. After considering the agent's or representative's response, the AA/BD will issue a final determination, setting forth the reasons for this decision and, if a suspension continues to be effective or a revocation is implemented, the term of the suspension or revocation.

SIZE FOR PRIMARY NAICS CODE

CURRENT RULE: § 124.102(a)

PROPOSED RULE:

Amend regulation to generally require that a firm remain small for its primary NAICS code during its term of participation in the 8(a) BD program, and permit SBA to graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code for two successive program years.

Currently, as long as a Participant remains small for any NAICS code for which it performs work, it can remain in the 8(a) program and attempt to win 8(a) contracts in that NAICS code.

FINAL:

The 8(a) program is a business development program designed to assist Participant firms advance toward competitive viability. Where a firm has grown to be other than small in its primary NAICS code, SBA believes that the program has been successful and it is reasonable to conclude that the firm has achieved the goals and objectives of its business plan. Because the Small Business Act authorizes early graduation where a firm has met the targets, goals and objectives set forth in its business plan, SBA believes that growing to other than small in a firm's primary industry classification similarly warrants consideration of early graduation. The program would resemble a contracting program more than a business development program where a firm is permitted to remain in the program after it has grown to be other than small in its primary NAICS code and be able to shop for contracting opportunities in NAICS codes having accompanying larger size standards. A firm that is other than small in its primary NAICS code is, and has always been, ineligible to be admitted to the 8(a) BD program. That being the case, SBA believes that it follows that a firm that grows to exceed its primary NAICS code once in the 8(a) BD program no longer needs and should be early graduated from the program. SBA recognizes, however, that it would be unfair to early graduate a firm from the 8(a) BD program where it has one very successful program year that may not again be repeated. In response to the comments received, the final rule changes the number of years that a Participant must exceed its primary NAICS code before SBA will consider early graduation from two years (as proposed) to three years. Additionally, in response to the many comments received regarding this provision, the rule allows a firm to demonstrate that it has made attempts and continues to move to one of the secondary NAICS codes identified in its business plan and that it will change the primary NAICS code accordingly. This will more closely align to the way SBA determines size under § 121.104.

In order to remain eligible to participate in the 8(a) BD program after certification, a firm must generally remain small for its primary industry classification, as adjusted during the program. SBA may graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted, for three successive program years, unless the firm is able to demonstrate that it has made attempts and further attempts to move forward in a secondary NAICS code (identified in its business plan) and will change its primary NAICS code accordingly.

ECONOMIC DISADVANTAGE

CURRENT RULE: § 124.104(b)(2)

PROPOSED RULE:

Proposed to add language to clarify that SBA does not take community property laws into account when determining economic disadvantage.

FINAL: Property that is legally in the name of one spouse would be considered wholly that spouse's property, whether or not the couple lived in a community property state. This policy also results in equal treatment for applicants in community and non-community property states.

CURRENT RULE: § 124.104(b)(2)

PROPOSED RULE:

Clarified that SBA may consider a spouse's financial situation in determining an individual's access to capital and credit.

FINAL:

SBA will consider a spouse's financial condition only when the spouse has a role in the business or has lent money to, provided credit support to, or guaranteed a loan of the business.

CURRENT RULE: § 124.104(c)(2)(ii) & (iii)

PROPOSED RULE:

Amend economic disadvantage requirement to exempt funds in Individual Retirement Accounts (IRAs) and other official retirement accounts from the calculation of net worth provided that the funds cannot currently be withdrawn from the account prior to retirement age without a significant penalty.

Clarify economic disadvantage requirement to exempt income from an S Corporation from the calculation of both income and net worth to the extent such income is reinvested in the firm or used to pay corporate taxes.

FINAL:

In considering diminished capital and credit opportunities, SBA will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including;

- 1) income for the past three years (including bonuses and the value of company stock received in lieu of cash);
- 2) personal net worth, and
- 3) the fair market value of all assets, whether encumbered or not.

An individual who exceeds any one of the thresholds set forth in this paragraph for personal income, net worth or total assets will generally be deemed to have access to credit and capital and not economically disadvantaged.

Funds invested in an Individual Retirement Account (IRA) or other official retirement account that are unavailable to an individual until retirement age without a significant penalty will not be considered in determining an individual's net worth. In order to properly assess whether funds invested in a retirement account may be excluded from an individual's net worth, the individual must provide information about the terms and restrictions of the account to SBA and certify that the retirement account is legitimate.

Income received from an applicant or Participant that is an S corporation, limited liability company (LLC) or partnership will be excluded from an individual's net worth where the applicant or Participant provides documentary evidence demonstrating that the income was reinvested in the firm or used to pay taxes arising in the normal course of operations of the firm. Losses from the S corporation, LLC or partnership, however, are losses to the company only, not losses to the individual, and cannot be used to reduce an individual's net worth.

CURRENT RULE: § 124.104(c)(3)

PROPOSED RULE:

Amend economic disadvantage requirement to provide that SBA may presume an individual is not economically disadvantaged if his or her adjusted gross income averaged over the past two years exceeds **\$200,000** for initial eligibility and **\$300,000** for continued eligibility.

Current rules require SBA to consider net worth, income and total assets in determining an individual's economic disadvantage. But, unlike the objective standard set forth in the regulations for net worth, there is no objective standard for income or total assets.

OHA precedent supported income in top 2% (approximately \$200,000) as not economically disadvantaged.

OIG has long supported objective standards for income and total assets.

FINAL:

The final rule adopts a personal income threshold amount of **\$250,000** for initial eligibility and **\$350,000** for continued eligibility (average over three years).

Firms that have applied to the 8(a) BD program prior to the date of publication of this final rule may elect to have their applications continued to be processed based on two years personal income data instead of three years.

CURRENT RULE: § 124.104(c)(4)

PROPOSED RULE:

Amend economic disadvantage requirement to establish an objective standard by which an individual can qualify as economically disadvantaged based on his or her total assets.

Under the proposed rule, an individual would generally not be considered economically disadvantaged if the fair market value of all his or her assets exceeds **\$3 million** at the time of 8(a) application and **\$4 million** for purposes of continued 8(a) BD program participation.

FINAL: Adopts and adjusts set threshold for total assets of a disadvantaged individual. A fair market value of all his or her assets that exceeds **\$4 million** at the time of 8(a) application and **\$6 million** for purposes of continued 8(a) BD program participation is indicative of lack of economic disadvantage.

CHANGES TO OWNERSHIP REQUIREMENTS

CURRENT RULE: § 124.105(g)

PROPOSED RULE:

Amend ownership requirements to provide more flexibility in determining whether to admit to the 8(a) program companies owned by individuals where such individuals have immediate family members who are owners of current or former 8(a) concerns.

Disadvantaged individuals/firms have strongly opposed the current rule which prohibits disadvantaged individuals in one family from owning more than 1 8(a) firm – e.g., an individual living in CA who owns a construction firm could not be admitted to the 8(a) program if his brother owned an engineering company (or any other company) in VA (or any other state). While we are cognizant of the potential for abuse (i.e., where one individual attempts to prolong his/her participation in the 8(a) program through another family member), we think the flexibility is needed and have provided safeguards to eliminate the abuse.

FINAL:

Ownership of Another Participant in the Same or Similar Line of Business

An individual may not use his or her disadvantaged status to qualify a concern if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program. The AA/BD may waive this prohibition if the two concerns have no connections, either in the form of ownership, control or contractual relationships, and provided the individual seeking to qualify the second concern has management and technical experience in the industry. Where the concern seeking a waiver is in the same or similar line of business as the current or former 8(a) concern, there is a presumption against

granting the waiver. The applicant must provide clear and compelling evidence that no connection exists between the two firms.

If the AA/BD grants a waiver, SBA will, as part of its annual review, assess whether the firm continues to operate independently of the other current or former 8(a) concern of an immediate family member. SBA may initiate proceedings to terminate a firm for which a waiver was granted from further participation in the 8(a) BD program if it is apparent that there are connections between the two firms that were not disclosed to the AA/BD when the waiver was granted or that came into existence after the waiver was granted. SBA may also initiate termination proceedings if the firm begins to operate in the same or similar line of business as the current or former 8(a) concern of the immediate family member and the firm did not operate in the same or similar line of business at the time the waiver was granted.

CURRENT RULE: § 124.105(h)(2)

PROPOSED RULE:

Adds the phrase “or a principal of such firms” that was inadvertently omitted from the current rule.

The current rule prohibits only concerns in the same or a similar line of business as an 8(a) concern from owning more than 10 percent interest in an 8(a) concern in the developmental stage of program participation or more than a 20 percent interest in a Participant in the transitional stage of the program.

FINAL:

A non-Participant concern in the same or similar line of business or a principal of such concern may not own more than a 10 percent interest in a Participant that is in the developmental stage or more than a 20 percent interest in a Participant in a transitional stage of the program, except that a former Participant or a principal of a former Participant (except those that have been terminated from 8(a) BD program participation pursuant to §§124.303 and 124.304) may have an equity ownership interest of up to 20 percent in a current Participant in the developmental stage of the program or up to 30 percent in a transitional stage Participant, in the same or similar line of business.

CHANGES TO CONTROL REQUIREMENTS

CURRENT RULE: § 124.106(a)(2)

PROPOSED RULE:

Amend to require that the disadvantaged manager of an 8(a) applicant or Participant must reside in the United States and generally spend part of every month physically present at the primary offices of the applicant or Participant.

This is in response to an OHA decision which found that an individual living in Paris, France controlled her company in New York without ever physically going to New York.

FINAL:

After considering the comments, the final rule **retains** the requirement that the disadvantaged manager of an 8(a) applicant or Participant must reside in the United States, but **eliminates** the added requirement that he or she must also spend part of every month physically present at the primary offices of the applicant or Participant.

CURRENT RULE: § 124.106(e)

PROPOSED RULE:

Clarified that control restrictions applying to non-disadvantaged managers, officers and directors applied to all non-disadvantaged individuals in an applicant or Participant firm.

FINAL:

Non-disadvantaged individuals may be involved in the management of an applicant or Participant, and may be stockholders, partners, limited liability members, officers, and/or directors of the applicant or Participant. However, no non-disadvantaged individual or immediate family member may:

- 1) Exercise actual control or have the power to control the applicant or Participant;
- 2) Be a former employer or a principal of a former employer of any disadvantaged owner of the applicant or Participant, unless it is determined by the AA/BD that the relationship between the former employer or principal and the disadvantaged individual or applicant concern does not give the former employer actual control or the potential to control the applicant or Participant and such relationship is in the best interests of the 8(a) BD firm; or
- 3) Receive compensation from the applicant or Participant in any form as directors, officers or employees, including dividends, that exceeds the compensation to be received by the highest officer (usually CEO or President). The highest ranking officer may elect to take a lower salary than a non-disadvantaged individual only upon demonstrating that it helps the applicant or Participant. In the case of a Participant, the Participant must also obtain the prior written consent of the AA/BD or designee before changing the compensation paid to the highest ranking officer to be below that paid to a non-disadvantaged individual.

PROPOSED RULE:

Added a section to address control of an 8(a) Participant where a disadvantaged individual upon whom eligibility is based is called up to active duty in the United States military.

FINAL: New § 124.106(h)

Notwithstanding the provisions of this section requiring a disadvantaged owner to control the daily business operations and long-term strategic planning of an 8(a) BD Participant, where a disadvantaged individual upon whom eligibility is based is a reserve component member in the United States military who has been called to active duty, the Participant may elect to designate one or more individuals to control the Participant on behalf of the disadvantaged individual during the active duty call-up period. If such an election is made, the Participant will continue to be treated as an eligible 8(a) Participant and no additional time will be added to its program term. Alternatively, the Participant may elect to suspend its 8(a) BD participation during the active duty call-up period pursuant to §§ 124.305(h)(1)(ii) and 124.305(h)(4).

BENCHMARKS

CURRENT RULE: § 124.108(f), §§ 124.302(d), 124.403(d), & 124.504.

PROPOSED RULE:

Remove § 124.108(f), as well as other references to the achievement of benchmarks contained in §§ 124.302(d), 124.403(d), and 124.504. When these regulations were first implemented, the Department of Commerce was supposed to update industry codes every few years to determine those industries which minority contractors were underrepresented in the federal market. These industry categories have never been revised since the initial publications and references to them are outdated and should be removed.

FINAL:

Adopts proposed eliminations

CHANGES APPLYING SPECIFICALLY TO TRIBALLY-OWNED FIRMS

CURRENT RULE: § 124.109, General

PROPOSED RULE:

Proposed changes:

- 1) How best to determine whether a tribe is economically disadvantaged;
- 2) Prohibiting work in a secondary NAICS code that is (or was within the last two years) the primary NAICS code of another 8(a) firm owned by the same tribe or ANC;
- 3) Clarifying the potential for success requirement as it is applied to tribes and ANCs;
- 4) Making it clear that any tribal member may participate in the management of a tribally-owned firm and need not individually qualify as economically disadvantaged; and
- 5) Requiring 8(a) firms owned by tribes and ANCs to submit information identifying how its 8(a) participation has benefited the tribal or native members and/or the tribal, native or other community as part of its annual review submission.

CURRENT RULE: § 124.109(b)

PROPOSED RULE:

Request comments (in the Supplementary Information) on how SBA should best determine whether an Indian tribe qualifies as “economically disadvantaged.”

FINAL:

SBA agrees that an asset or net worth test could be misleading, and **will not change** how it will determine economic disadvantage for tribes.

Clarifies that a tribe does not need to demonstrate economic disadvantage as part of every tribally-owned 8(a) application for certification.

Authorizes a tribe to request a meeting with SBA prior to submitting an application for 8(a) BD participation for its first applicant firm to better understand what SBA requires.

CURRENT RULE: § 124.109(c)(3)(ii)

PROPOSED RULE:

Amend the rules pertaining to tribal and ANC-owned firms to prohibit a new tribally or ANC-owned firm from performing any contracts in a NAICS code that is the primary NAICS code of another firm owned by the same tribe or ANC (or was the primary NAICS code of a firm that recently left the 8(a) program) for a period of two years after admission into the program.

Currently, a tribally-owned applicant cannot have the same primary NAICS code as another firm in the 8(a) BD program owned by the same tribe or one that has left the program within the last two years. It could perform secondary work in such a NAICS code, but it could not duplicate the primary NAICS code of another or recently former tribally-owned 8(a) Participant.

FINAL:

Removes the strict limitation contained in the proposed rule.

The final rule **adds** a provision that a firm owned by a tribe or ANC may not receive an 8(a) contract that is a follow-on contract to an 8(a) contract performed by another Participant (or former Participant that has left the program within two years of the date of application) owned by the tribe or ANC for a period of two years from the date of admission to the program.

For purposes of consistency the final rule makes the provisions pertaining to tribes, ANCs, NHOs and CDCs consistent.

In response to requests for clarification the final rule makes clear that the same primary NAICS code means the six digit NAICS code having the same corresponding size standard.

CURRENT RULE: § 124.109(c)(4)

PROPOSED RULE:

Amend the rules pertaining to tribally-owned concerns to eliminate the requirement that a tribally-owned firm must be controlled by a “disadvantaged” tribal member.

This change will make clear that any tribal member may participate in the management of a tribally-owned firm and need not individually qualify as economically disadvantaged (thus eliminating the need that every member of a tribally-owned concern’s Board of Directors must provide tax returns and other financial information).

Tribal representatives emphasized the need for this change to enable them to attract the most qualified tribal members to assist in running tribal businesses and further allow them to assist economic and community development through their tribally-owned concerns.

FINAL:

The management and daily business operations of a tribally-owned concern must be controlled by the tribe. The tribally-owned concern may be controlled by the tribe through one or more individuals who possess sufficient management experience of an extent and complexity needed to run the concern, or through management as follows:

- 1) Management may be provided by committees, teams, or Boards of Directors which are controlled by one or more members of an economically disadvantaged tribe, or
- 2) Management may be provided by non-tribal members if the concern can demonstrate that the tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how tribal members will develop managerial skills sufficient to manage the concern or similar tribally-owned concerns in the future.
 - a. Members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.

CURRENT RULE: § 124.109(c)(6)

PROPOSED RULE:

The proposed rule clarified the potential for success requirement for tribally-owned applicants contained in § 124.109(c)(6). The proposed rule authorized SBA to find potential for success where a tribe has made a firm written commitment to support the operations of the applicant concern and the tribe has the financial ability to do so.

FINAL:

Adopts proposed language and extends it to NHOs and CDCs.

Potential for Success

A tribally-owned applicant concern must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. A tribally-owned applicant may establish potential for success by demonstrating that:

- i. it has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification; or

- ii. the individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or
- iii. the tribe has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

CURRENT RULE:

Proposed § 124.112(b) & new §124.604.

PROPOSED RULE:

In response to audits of the 8(a) BD program conducted by GAO and SBA's OIG, SBA proposed an amendment to the annual review provisions contained in § 124.112(b) to require each Participant owned by a tribe, ANC, NHO or CDC to submit information demonstrating how its 8(a) participation has benefited the tribal or native members and/or the tribal, native or other community as part of its annual review submission. The proposed rule identified that each firm should submit information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services to the affected community.

FINAL:

Changes the provision from requiring reporting at the individual 8(a) Participant level to the entity (tribe, ANC, NHO or CDC) level.

Moves the requirement from the continuing eligibility requirements (§ 124.112(b)(8)) to a new section under the reporting requirements (§124.604).

Delayed implementation of new § 124.604 for six months after the effective date for the other provisions of this final rule. This will allow further discussions with tribal/ANC community, and, if necessary, revisions to this provision.

As part of its annual review submission, each Participant owned by a tribe, ANC, NHO or CDC must submit to SBA information showing how the tribe, ANC, NHO or CDC has provided benefits to the tribal or native members and/or the tribal, native or other community due to the tribe's/ANC's/NHO's/ CDC's participation in the 8(a) BD program through one or more firms. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the tribe, ANC, NHO or CDC to the affected community.

EXCESSIVE WITHDRAWALS

CURRENT RULE: § 124.112(d)

PROPOSED RULE:

Amend the current rules regarding what amounts should be considered excessive withdrawals, and thus a basis for possible termination or early graduation.

The supplementary information to the proposed rule stated that SBA believed that the current definition of withdrawal unreasonably restricts Participants.

FINAL:

Considered the alternate approaches suggested, but **retains** thresholds based on the revenues generated by the Participant as the most fair and reasonable approach.

Increases “excessive” withdrawal amounts for firms with sales of less than \$1,000,000 (to \$250,000 from the current \$150,000), for firms with sales between \$1,000,000 and \$2,000,000 (to \$300,000 from the current \$200,000), and for firms with sales exceeding \$2,000,000 (to \$400,000 from the current \$300,000).

Clarifies that withdrawals that exceed the threshold amounts in the aggregate will be considered excessive.

Authorizes SBA to look at the ‘totality of the circumstances’ in determining whether to include a specific amount as a “withdrawal.

To more fully comply with statutory language, **clarifies** that in order for termination or early graduation to be considered, funds or assets must be withdrawn from the Participant for the *personal benefit* of one or more owners or managers, or any person or entity affiliated with such owners or managers, and any withdrawal must be detrimental to the achievement of the targets, objectives, and goals contained in the Participant’s business plan.

CURRENT RULE: § 124.112(e)

PROPOSED RULE:

Permit firms to change primary NAICS code.

FINAL:

Change in Primary Industry Classification

A Participant may request that the primary industry classification contained in its business plan be changed by filing such a request with its servicing SBA district office. SBA will grant such a request where the Participant can demonstrate that the majority of its total revenues during a three-year period have evolved from one NAICS code to another.

APPLICATIONS TO THE 8(a) BD PROGRAM

PROPOSED RULE: §§ 124.202, 124.203, 124.204 and 124.205

CURRENT RULE:

Add minor changes to the regulations to emphasize SBA’s preference that applications for participation in the 8(a) program be submitted in an electronic format.

While SBA would not prohibit any firm from filing a paper application if it wished to, SBA's clear preference for use of the electronic application is highlighted.

Supplementary Information asks for comments on a provision requiring electronic applications in all cases.

The use of the electronic application not only reduces the administrative burden on SBA, but is reflective of a government-wide shift to use electronic applications and forms whenever possible.

FINAL:

The proposed rule made minor changes to §§ 124.202, 124.203, 124.204 and 124.205 to emphasize SBA's preference that applications for participation in the 8(a) BD program are to be submitted in an electronic format. SBA received only positive comments to these proposed changes. As such, the final rule does not change these provisions from those proposed.

Despite the preference for an electronic application, SBA again wants to clarify that nothing in the proposed rule or in this final rule would prohibit hard copy 8(a) BD applications from being submitted to and processed by SBA. Firms that prefer to file a hard copy application may continue to do so.

§ 124.202

An application for 8(a) BD program admission must generally be filed in an electronic format. An electronic application can be found by going to the 8(a) BD page of SBA's website (www.sba.gov). An applicant concern that does not have access to the electronic format or does not wish to file an electronic application may request in writing a hard copy application from the AA/BD. The SBA district office will provide an applicant concern with information regarding the 8(a) BD program.

§ 124.203

Each 8(a) BD applicant concern must submit those forms and attachments required by SBA when applying for admission to the 8(a) BD program. These forms and attachments may include, but not be limited to, financial statements, copies of signed Federal personal and business tax returns, individual and business bank statements, and personal history statements. An applicant must also submit a signed IRS Form 4506T, Request for Copy or Transcript of Tax Form, to SBA. In all cases, the applicant must provide a wet signature from each individual claiming social and economic disadvantage status.

§ 124.204

- 1) The AA/BD is authorized to approve or decline applications for admission to the 8(a) BD program. The Division of Program Certification and Eligibility (DPCE) will receive, review and evaluate all 8(a) BD applications. SBA will advise each program applicant within 15 days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will process an application for 8(a) BD program

participation within 90 days of receipt of a complete application package by the DPCE. Incomplete packages will not be processed.

- 2) SBA, in its sole discretion, may request clarification of information contained in the application at any time in the application process. SBA will take into account any clarifications made by an applicant in response to a request for such by SBA.
- 3) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the firm or would demonstrate lack of eligibility in the area to which the information relates.
- 4) Changed circumstances for an applicant concern occurring subsequent to its application and which adversely affect eligibility will be considered and may constitute grounds for decline. The applicant must inform SBA of any changed circumstances that could adversely affect its eligibility for the program (particularly economic disadvantage and ownership and control) during its application review. Failure to inform SBA of any such changed circumstances constitutes good cause for which SBA may terminate the Participant if non-compliance is discovered after admittance.
- 5) The decision of the AA/BD to approve or deny an application will be in writing. A decision to deny admission will state the specific reasons for denial, and will inform the applicant of any appeal rights.
- 6) If the AA/BD approves the application, the date of the approval letter is the date of program certification for purposes of determining the concern's program term.

§ 124.205

An applicant may request the AA/BD to reconsider his or her initial decline decision by filing a request for reconsideration with SBA. The applicant may submit a revised electronic application or submit its request for reconsideration to the SBA DPCE unit that originally processed its application by personal delivery, first class mail, express mail, facsimile transmission followed by first class mail, or commercial delivery service. The applicant must submit its request for reconsideration within 45 days of its receipt of written notice that its application was declined. If the date of actual receipt of such written notice cannot be determined, SBA will presume receipt to have occurred ten calendar days after the date the notice was sent to the applicant. The applicant must provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline, whether or not available at the time of initial application, including information and documentation regarding changed circumstances.

The AA/BD will issue a written decision within 45 days of SBA's receipt of the applicant's request. The AA/BD may either approve the application, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the AA/BD will explain why the applicant is not eligible for admission to the 8(a) BD program and give specific reasons for the decline.

GRADUATION

CURRENT RULE: §§ 124.301 and 124.302

PROPOSED RULE:

Utilize the terms “early graduation” and “graduation” in a way that matches the statutory meaning of those terms. See amendment to § 124.2, explained above.

FINAL:

The final rule changes the number of years that a Participant must exceed its primary NAICS code before SBA will consider early graduation from two years (as proposed) to three years. Additionally, in response to the many comments received regarding this provision, the rule allows a firm to demonstrate that it has made attempts and continues to move to one of the secondary NAICS codes identified in its business plan and that it will change the primary NAICS code accordingly. This will more closely align to the way SBA determines size under § 121.104.

Authorizes SBA to look at ‘the totality of the circumstances’ when determining whether or not to early graduate the firm from continued 8(a) participation.

§ 124.301

A concern participating in the 8(a) BD program may leave the program by any of the following means:

- 1) Expiration of the program term established pursuant to § 124.2;
- 2) Voluntary withdrawal or voluntary early graduation;
- 3) Graduation pursuant to § 124.302;
- 4) Early graduation pursuant to the provisions of §§ 124.302 and 124.304; or
- 5) Termination pursuant to the provisions of §§ 124.303 and 124.304.

§ 124.302

SBA may graduate a firm from the 8(a) BD program at the expiration of its program term (graduation) or prior to the expiration of its program term (early graduation) where SBA determines that:

- 1) The concern has successfully completed the 8(a) BD program by substantially achieving the targets, objectives, and goals set forth in its business plan, and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program; or
- 2) One or more of the disadvantaged owners upon whom the Participant's eligibility is based are no longer economically disadvantaged.

In determining whether a Participant has substantially achieved the targets, objectives and goals of its business plan and in assessing the overall competitive strength and viability of a Participant, SBA considers the totality of circumstances, including the following factors:

- 1) Degree of sustained profitability;
- 2) Sales trends, including improved ratio of non-8(a) sales to 8(a) sales since program entry;

- 3) Business net worth, financial ratios, working capital, capitalization, and access to credit and capital;
- 4) Current ability to obtain bonding;
- 5) A comparison of the Participant's business and financial profiles with profiles of non-8(a) BD businesses having the same primary four-digit SIC code as the Participant;
- 6) Strength of management experience, capability, and expertise; and
- 7) Ability to operate successfully without 8(a) contracts.

Exceeding the Size Standard Corresponding to the Primary NAICS Code

SBA may graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted during the program, for three successive program years, unless the firm is able to demonstrate that it has made attempts and further attempts to move forward in a secondary NAICS code (identified in its business plan) and will change its primary NAICS code accordingly.

TERMINATION

CURRENT RULE: § 124.303

PROPOSED RULE:

Amend § 124.303(a)(2) to clarify that a Participant could be terminated from the program where an individual owner or manager exceeds any of the thresholds for economic disadvantage (i.e., net worth, personal income or total assets), or is otherwise determined not to be economically disadvantaged, where such status is needed for the Participant to remain eligible, and where the Participant has not met the targets and objectives set forth in its business plan.

FINAL:

Failure by the concern to maintain its eligibility for program participation, including failure by an individual owner or manager to continue to meet the requirements for economic disadvantage set forth in § 124.104 where such status is needed for eligibility and the Participant has not met the targets and objectives set forth in its business plan.

CURRENT RULE: § 124.303(a)(13)

PROPOSED RULE:

Amend § 124.303(a)(13) to be consistent with the proposed changes to § 124.112(d)(13) regarding excessive withdrawals being a basis for termination. The proposed rule authorized termination where an excessive withdrawal was deemed to “hinder the development of the concern.”

FINAL:

Excessive withdrawals that are detrimental to the achievement of the targets, objectives, and goals contained in the Participant’s business plan, including transfers of funds or other business assets from the concern for the personal benefit of any of its owners or managers, or any person or entity affiliated with the owners or managers (see § 124.112(d)).

CURRENT RULE: §124.303(a)(16)

PROPOSED RULE:

Amended §124.303(a)(16) to remove the reference to part 145, a regulatory provision that addresses nonprocurement debarment and suspension that was moved to 2 CFR parts 180 and 2700.

FINAL:

Debarment, suspension, voluntary exclusion, or ineligibility of the concern or its principals pursuant to 2 C.F.R. parts 180 and 2700 or FAR subpart 9.4 (48 CFR part 9, subpart 9.4).

EFFECT OF EARLY GRADUATION OR TERMINATION

CURRENT RULE: § 124.304(f)

PROPOSED RULE:

Clarify the effect an early graduation or termination would have. When SBA early graduates or terminates a firm from the 8(a) BD program, the proposed rule would also remove the firm from the list of qualified SDBs. If the firm believes that it meets all SDB eligibility criteria, it could apply for SDB certification, and it could do so at any time after the early graduation or termination that it believed it met applicable SDB eligibility criteria.

This is not a change in policy. It has just been added to the regulations for clarity.

FINAL:

SBA allows a contracting officer to accept an SDB certification where he or she believes that the firm currently qualifies as an SDB, and to protest the firm's SDB status to SBA where he or she continues to have questions about the firm's current SDB status.

When SBA early graduates or terminates a firm from the 8(a) BD program, the firm will generally not qualify as an SDB for future procurement actions. If the firm believes that it *does* qualify as an SDB and seeks to certify itself as an SDB, as part of its SDB certification the firm must identify:

- 1) that it has been early graduated or terminated;
- 2) the statutory or regulatory authority that qualifies the firm for SDB status; and
- 3) where applicable, the circumstances that have changed since the early graduation or termination or that do not prevent it from qualifying as an SDB.

Where a concern certifies that it qualifies as an SDB the procuring activity contracting officer may protest the SDB status of the firm to SBA pursuant to § 124.1010 where questions regarding the firm's SDB status remain.

SUSPENSIONS FOR CALL-UPS TO ACTIVE DUTY

CURRENT RULE: § 124.305

PROPOSED RULE:

Amend § 124.305 to permit SBA to suspend an 8(a) Participant where the individual upon whom eligibility is based can no longer control the day-to-day operations of the firm because the individual is a reservist in the United States military who has been called to active duty.

Under current rules, where the individual upon whom eligibility was based does not control the day-to-day operations of the firm, the firm is ineligible for additional 8(a) contracts and there is no statutory or regulatory authority to permit such a firm to stay in the 8(a) program, whether on an active or inactive basis, while the individual upon whom eligibility is based is away from the firm for an extended period of time (i.e., termination from the program is an option).

Suspension in these circumstances is intended to preserve the firm's full term in the program by adding the time of the suspension to the end of the Participant's program term when the individual returns to control its daily business operations.

FINAL:

SBA will suspend a Participant from receiving further 8(a) BD program benefits when termination proceedings have not been commenced pursuant to § 124.304 where:

- 1) a Participant requests a change of ownership and/or control and SBA discovers that a change of ownership or control has in fact occurred prior to SBA's approval; or
- 2) a disadvantaged individual who is involved in the ownership and/or control of the Participant is called to active military duty by the United States, his or her participation in the firm's management and daily business operations is critical to the firm's continued eligibility, and the Participant elects not to designate a non-disadvantaged individual to control the concern during the call-up period pursuant to §124.106(h).

A suspension initiated under paragraph (h) of this section will be commenced by the issuance of a notice similar to that required for termination-related suspensions under paragraph (b) of this section, except that a suspension issued under paragraph (h) is not appealable.

Where a Participant is suspended pursuant to paragraph (h)(1)(i) of this section and SBA approves the change of ownership and/or control, the length of the suspension will be added to the firm's program term only where the change in ownership or control results from the death or incapacity of a disadvantaged individual or where the firm requested prior approval and waited at least 60 days for SBA approval before making the change.

Where a Participant is suspended pursuant to paragraph (h)(1)(ii) of this section, the Participant must notify SBA when the disadvantaged individual returns to control the firm so that SBA can immediately lift the suspension. When the suspension is lifted, the length of the suspension will be added to the concern's program term.

Effect of Suspension

Once a suspension is issued pursuant to this section, a Participant cannot receive any additional 8(a) BD program assistance, including new 8(a) contract awards, for as long as the Participant is suspended. This includes any procurement requirements that the firm has self-marketed and those that have been accepted into the 8(a) BD program on behalf of the suspended concern. However, such concern must complete previously awarded 8(a) contracts.

TASK AND DELIVERY ORDER CONTRACTS

CURRENT RULE: § 124.503(h)

PROPOSED RULE:

Amend the offer and acceptance procedures regarding multiple award contracts to allow agencies to receive 8(a) credit for orders placed with 8(a) concerns under contracts that were not set aside for 8(a) concerns as long as the order is offered to and accepted for the 8(a) BD program and competed exclusively among eligible 8(a) concerns, and as long as the limitations on subcontracting provisions apply to the individual order.

FINAL:

Adopts the proposed language and merely allows contracting officers the discretion to reserve orders for 8(a) concerns if they so choose.

The rule does not require any contracting officer to make such a reservation. If a contracting officer chose not to reserve a specific order for 8(a) concerns the contracting officer could continue to take SDB credit for the award of an order to an 8(a) firm, but could not count the order as an 8(a) award.

BARRIERS TO ACCEPTANCE & RELEASE FROM THE 8(a) BD PROGRAM

CURRENT RULE: § 124.504

PROPOSED RULE:

Clarify that follow-on or repetitive 8(a) procurements must remain in the 8(a) BD program unless SBA agrees to release them for non-8(a) competition.

While this was implicit in SBA's regulations (and is SBA's current policy), it was not specifically set forth in the regulations.

FINAL:

The final rule limits SBA's ability to accept a requirement for the 8(a) BD program where a procuring agency expresses a clear intent to make a small business set-aside, or HUBZone, SDVO small business, or WOSB award prior to offering the requirement to SBA for award as an 8(a) contract.

COMPETITIVE THRESHOLD AMOUNTS

CURRENT RULE: § 124.506

PROPOSED RULE:

Amend the dollar limits above which 8(a) procurements must be competed among eligible Participants to mirror the changes made to the FAR based on legislation passed by Congress in 2004 requiring an inflationary adjustment of statutory acquisition-related dollar thresholds every five years. Since the 2004 changes the threshold amounts have increased and an 8(a) procurement will be competed if the anticipated award price of the contract, including options, will exceed \$6,500,000 for manufacturing contracts and \$4,000,000 for all other contracts.

This is purely an administrative change to make SBA's regulations consistent with the FAR.

FINAL:

Since the publication of the proposed rule, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have determined that a further inflation adjustment to the 8(a) competitive threshold amounts is warranted and have set the new amounts at \$6,500,000 as the competitive threshold for contracts assigned a manufacturing NAICS code and \$4,000,000 as the competitive threshold for all other contracts. 75 Fed. 53129 (Aug. 30, 2010). The councils are authorized by section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 to adjust acquisition-related thresholds every five years for inflation using the Consumer Price Index (CPI) for all urban consumers, except for Davis-Bacon Act, Service Contract Act, and trade agreements thresholds. As these thresholds are statutory and SBA cannot change them administratively, the final rule adopts the language from the final rule amending the FAR.

Competitive Thresholds

The Federal Acquisition Regulatory Council (FAR Council) has the responsibility of adjusting each acquisition-related dollar threshold on October 1, of each year that is evenly divisible by five. Acquisition-related dollar thresholds are defined as dollar thresholds that are specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency as determined by the FAR Council. 41 U.S.C. 431a(c). Part 124, Subpart A, 8(a) Business Development, contains acquisition-related dollar thresholds subject to inflationary adjustments. The FAR Council shall publish a notice of the adjusted dollar thresholds in the Federal Register. The adjusted dollar thresholds shall take effect on the date of publication.

A procurement offered and accepted for the 8(a) BD program must be competed among eligible Participants if:

- 1) There is a reasonable expectation that at least two eligible Participants will submit offers at a fair market price;
- 2) The anticipated award price of the contract, including options, will exceed \$6,500,000 for contracts assigned manufacturing NAICS codes and \$4,000,000 for all other contracts; and
- 3) The requirement has not been accepted by SBA for award as a sole source 8(a) procurement on behalf of a tribally-owned or ANC-owned concern.

For all types of contracts, the applicable competitive threshold amounts will be applied to the procuring activity estimate of the total value of the contract, including all options. For indefinite delivery or indefinite quantity type contracts, the thresholds are applied to the maximum order amount authorized.

Example

If the anticipated award price for a professional services requirement is determined to be \$3.8 million and it is accepted as a sole source 8(a) requirement on that basis, a sole source award will be valid even if the contract price arrived at after negotiation is \$4.2 million.

Where the estimate of the total value of a proposed 8(a) contract is less than the applicable competitive threshold amount and the requirement is accepted as a sole source requirement on that basis, award may be made even though the contract price arrived at through negotiations exceeds the competitive threshold, provided that the contract price is not more than ten percent greater than the competitive threshold amount.

A proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount may not be divided into several separate procurement actions for lesser amounts in order to use 8(a) sole source procedures to award to a single contractor.

CURRENT RULE: § 124.506(b)(4)

PROPOSED RULE:

Amend the rules relating to sole source 8(a) awards above the competitive threshold amounts to joint ventures involving a tribally-owned or ANC-owned 8(a) firm. Specifically, the proposal would prohibit non-8(a) joint venture partners (most notably large business mentors) to 8(a) sole source contracts from also being subcontractors under the joint venture prime contract. This change should ensure that the benefits of the program flow to its intended beneficiaries.

Necessary to eliminate perceptions that large businesses are unduly benefiting from the 8(a) program, although it may be somewhat controversial.

FINAL:

The final rule prohibits a non-8(a) joint venture partner from acting as a subcontractor to the joint venture awardee on any 8(a) contract.

In response to a comment the final rule allows a non-8(a) joint venture partner to act as a subcontractor where the AA/BD determines that other potential subcontractors are not available.

CURRENT RULE: § 124.506(b)

PROPOSED RULE:

Amend the rules permitting sole source awards above the competitive threshold amounts to include Native Hawaiian Organizations (NHOs) for DOD 8(a) contracts.

This change merely implements a provision of the DOD appropriations act for FY 2004, which gave DOD agencies the authority to make sole source awards for 8(a) contracts above the competitive threshold amounts to 8(a) concerns owned and controlled by NHOs.

FINAL:

Exemption From Competitive Thresholds for Participants Owned by Indian Tribes, ANC's and NHOs

- 1) A Participant concern owned and controlled by an Indian tribe or an ANC may be awarded a sole source 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.
- 2) A Participant concern owned and controlled by an NHO may be awarded a sole source Department of Defense (DoD) 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.
- 3) There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole source basis for a tribally-owned or ANC-owned concern, or a concern owned by an NHO for DoD contracts, but a procurement may not be removed from competition to award it to a tribally-owned, ANC-owned or NHO-owned concern on a sole source basis.
- 4) A joint venture between one or more eligible tribally-owned, ANC-owned or NHO-owned Participants and one or more non-8(a) business concerns may be awarded sole source 8(a) contracts above the competitive threshold amount, provided that it meets the requirements of § 124.513.

BONA FIDE PLACE OF BUSINESS

CURRENT RULE: § 124.507(c) and (d)

PROPOSED RULE:

Amend the bona fide place of business requirements to require that a Participant must first submit its request to be recognized as having a bona fide place of business in a different location to the SBA district office that normally services it., thereby ensuring that there is proper coordination between that office and the SBA district office serving the geographic location of the area in which it seeks to establish a new bona fide place of business.

FINAL:

A Participant may have bona fide places of business in more than one location.

In order for a Participant to establish a bona fide place of business in a particular geographic location, the SBA district office serving the geographic area of that location must determine if that location in fact qualifies as a bona fide place of business under SBA's requirements.

To do so a Participant must submit a request for a bona fide business determination to the SBA district office servicing it.

The servicing district office will forward the request to the SBA district office serving the geographic area of the particular location for processing.

The effective date of a bona fide place of business is the date that the evidence (paperwork) shows that the business in fact regularly maintained its business at the new geographic location.

In order for a Participant to be eligible to submit an offer for a 8(a) procurement limited to a specific geographic area, it must receive from SBA a determination that it has a bona fide place of business within that area prior to submitting its offer for the procurement.

Award To Firms Whose Program Terms Have Expired

A concern that has completed its term of participation in the 8(a) BD program may be awarded a competitive 8(a) contract if it was a Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the contract solicitation, and if it continues to meet all other applicable eligibility criteria.

Amendments to the solicitation extending the date for submissions of offers will be disregarded.

Example

The program term for 8(a) Participant X is scheduled to expire on December 19. A solicitation for a competitive 8(a) procurement specifies that initial offers are due on December 15. The procuring activity amends the solicitation to extend the date for the receipt of offers to January 5. X submits its offer on January 5 and is selected as the apparent successful offeror. X is eligible for award because it was an eligible 8(a) Participant on the initial date set forth in the solicitation for the receipt of offers.

For a negotiated procurement, a Participant may submit revised offers, including a best and final offer, and be awarded a competitive 8(a) contract if it was eligible as of the initial date specified for the receipt of offers in the solicitation, even though its program term may expire after that date.

COMPETITIVE BUSINESS MIX

CURRENT RULE: § 124.509(a)(1) and (e)

PROPOSED RULE:

The proposed rule amended § 124.509(a)(1) to clarify that work performed by an 8(a) Participant for any Federal department or agency other than through an 8(a) contract, including work performed on orders under the General Services Administration (GSA) Multiple Award Schedule program, and work performed as a subcontractor, including work performed as a subcontractor to another 8(a) Participant on an 8(a) contract, qualifies as work performed outside the 8(a) BD program. This change was made to respond to specific questions raised concerning

whether orders off the GSA Schedule and subcontracts on 8(a) contracts counted against their competitive business mix requirement.

FINAL:

§ 124.509(a)(1) - Non-8(A) Business Activity Targets

To ensure that Participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after graduating from the 8(a) BD program, Participants must make maximum efforts to obtain business outside the 8(a) BD program. Work performed by an 8(a) Participant for any Federal department or agency other than through an 8(a) contract, including work performed on orders under the General Services Administration Multiple Award Schedule program, and work performed as a subcontractor, including work performed as a subcontractor to another 8(a) Participant on an 8(a) contract, qualifies as work performed outside the 8(a) BD program.

§ 124.509(e) - Waiver Of Sole Source Prohibition

The AA/BD, or his or her designee, may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when a Participant does not meet its non-8(a) business activity target where a denial of a sole source contract would cause severe economic hardship on the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target. A firm receiving a waiver will be able to self market its capabilities and receive one or more sole source 8(a) contracts during the next program year. At its next annual review, SBA will reevaluate the firm's circumstances and determine whether the waiver should be extended an additional program year. The decision to grant or deny a request for a waiver is at SBA's discretion, and no appeal may be taken with respect to that decision.

ADMINISTRATION OF 8(a) CONTRACTS

CURRENT RULE: § 124.512

PROPOSED RULE:

The proposed rule also added clarifying language to § 124.512 to make clear that tracking compliance with the performance of work requirements is a contract administration function which is performed by the procuring activity.

FINAL:

The final rule **amends** the provision to require a contracting officer to submit copies to SBA of all modifications and options exercised within 15 business days of their occurrence, or by another date agreed upon by SBA.

SBA may delegate, by the use of special clauses in the 8(a) contract documents or by a separate agreement with the procuring activity, all responsibilities for administering an 8(a) contract to the procuring activity except the approval of novation agreements under 48 CFR 42.302(a)(25). Tracking compliance with the performance of work requirements set forth in § 124.510 is

included within the functions performed by the procuring activity as part of contract administration.

This delegation of contract administration authorizes a contracting officer to execute any priced option or in scope modification without SBA's concurrence. The contracting officer must, however, submit copies to the SBA servicing district office of all modifications and options exercised within 15 business days of their occurrence, or by another date agreed upon by SBA.

SBA may conduct periodic compliance on-site agency reviews of the files of all contracts awarded pursuant to Section 8(a) authority.

CHANGES TO JOINT VENTURE REQUIREMENTS

CURRENT RULE: § 124.513

PROPOSED RULE:

The proposed rule made four significant amendments to the joint venture requirements contained in § 124.513(c)(3).

- 1) The 8(a) Participant(s) to an 8(a) joint venture must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s);
- 2) The 8(a) Participant(s) to a joint venture for an 8(a) contract must perform at least 40% of the work done by the joint venture;
- 3) Where a joint venture has been established and approved by SBA for one 8(a) contract, a second or third 8(a) contract may be awarded to that joint venture provided an addendum to the joint venture agreement, setting forth the performance requirements on that second or third contract, is provided to and approved by SBA prior to contract award; and
- 4) Each 8(a) firm that performs an 8(a) contract through a joint venture must report to SBA how the performance of work requirements (i.e., that the joint venture performed at least 50% of the work of the contract and that the 8(a) participant to the joint venture performed at least 40% of the work done by the joint venture) were met on the contract.

FINAL:

If approved by SBA, a Participant may enter into a joint venture agreement with one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing one or more specific 8(a) contracts.

A joint venture agreement is permissible only where an 8(a) concern lacks the necessary capacity to perform the contract on its own, and the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. However, where SBA concludes that an 8(a) concern brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, SBA will not approve the joint venture arrangement.

Size Of Concerns To an 8(a) Joint Venture

A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer as a small business for a competitive 8(a) procurement so long as each concern is

small under the size standard corresponding to the NAICS code assigned to the contract, provided:

- 1) The size of at least one 8(a) Participant to the joint venture is less than one half the size standard corresponding to the SIC code assigned to the contract; and
- 2) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract; or for a procurement having an employee-based size standard, the procurement exceeds \$10 million.

For sole source and competitive 8(a) procurements that do not exceed the dollar levels identified in paragraph (b)(1) of this section, an 8(a) Participant entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the 8(a) contract. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the SIC code assigned to the 8(a) contract.

A joint venture between a protégé firm and its approved mentor (*see* §124.520) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the SIC code assigned to the procurement and has not reached the dollar limit set forth in §124.519.

Contents Of Joint Venture Agreement

Every joint venture agreement to perform an 8(a) contract, including those between mentors and protégés authorized by §124.520, must contain a provision:

- 1) Setting forth the purpose of the joint venture;
- 2) Designating an 8(a) Participant as the managing venturer of the joint venture. In an unpopulated joint venture, the joint venture must designate an employee of the 8(a) managing venturer as the project manager responsible for performance of the contract. In a populated joint venture, the joint venture must otherwise demonstrate that performance of the contract is controlled by the 8(a) managing venturer;
- 3) Stating that with respect to a separate legal entity joint venture the 8(a) Participant(s) must own at least 51% of the joint venture entity;
- 4) Stating that the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s), or in the case of a separate legal entity joint venture commensurate with their ownership interests in the joint venture;
- 5) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each;
- 6) Specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the 8(a) contract;
- 7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section.

- 8) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;
- 9) Requiring the final original records be retained by the managing venturer upon completion of the 8(a) contract performed by the joint venture;
- 10) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and
- 11) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

Performance of Work

For any 8(a) contract, including those between mentors and protégés authorized by § 124.520, the joint venture must perform the applicable percentage of work required by § 124.510. For an unpopulated joint venture, the 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture. The work performed by 8(a) partners to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

For a populated joint venture, each 8(a) Participant to the joint venture must demonstrate what it will gain from performance of the contract and how such performance will assist in its business development. If the joint venture is populated only with one or more administrative personnel, the 8(a) partner(s) to the joint venture must perform at least 40% of the work done by the joint venture partners in the aggregate.

A non-8(a) joint venture partner, or any of its affiliates, may not act as a subcontractor to the joint venture awardee or to any other subcontractor of the joint venture, unless the AA/BD determines that other potential subcontractors are not available. If a non-8(a) joint venture partner seeks to do more work, the additional work must generally be done through the joint venture, which would require the 8(a) partner(s) to the joint venture to also do additional work to meet the 40% requirement set forth in the first paragraph of this section.

In an unpopulated joint venture, where both the 8(a) and non-8(a) partners are technically subcontractors, the amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-8(a) partner, all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier will be counted.

Prior Approval by SBA

SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture.

Where a joint venture has been established and approved by SBA for one 8(a) contract, a second or third 8(a) contract may be awarded to that joint venture provided an addendum to the joint

venture agreement, setting forth the performance requirements on that second or third contract, is provided to and approved by SBA prior to contract award.

- 1) After approving the structure of the joint venture in connection with the first contract, SBA will review only the addendums relating to performance of work on successive contracts.
- 2) SBA must approve the addendums prior to the award of any successive 8(a) contract to the joint venture.

Contract Execution

Where SBA has approved a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity.

Amendments to Joint Venture Agreement

All amendments to the joint venture agreement must be approved by SBA.

Inspection of Records

SBA may inspect the records of the joint venture without notice at any time deemed necessary.

Performance of Work Report

At the completion of every 8(a) contract awarded to a joint venture, the 8(a) Participant(s) to the joint venture must submit a report to the local SBA district office explaining how the performance of work requirements were met for the contract.

SOLE SOURCE LIMITS FOR NHO-OWNED CONCERNS

CURRENT RULE: § 124.519

PROPOSED RULE:

Section 124.519 generally imposes limits to the amount of 8(a) contract dollars a Participant may receive on a sole source basis. The current rule exempts ANC and tribally-owned concerns from the limitations set forth in the rule.

The proposed rule added NHO-owned concerns to the list of 8(a) concerns exempted from the limitations. Because all three are statutorily exempt from sole source thresholds, SBA believes that all three of these types of firms should be treated consistently.

FINAL:

A Participant (other than one owned by an Indian tribe, ANC or NHO) may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of the dollar amount set forth in this section during its participation in the 8(a) BD program.

The AA/BD may waive the requirement prohibiting a Participant from receiving sole source 8(a) contracts in excess of the dollar amount set forth in this section where the head of a procuring

activity represents that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

CHANGES TO MENTOR/PROTÉGÉ PROGRAM

CURRENT RULE: § 124.520(a)

PROPOSED RULE:

Clarify the rules governing SBA's mentor/protégé program to specifically require that assistance to be provided through a mentor/protégé relationship be tied to the protégé firm's SBA-approved business plan.

This was assumed before, but we felt it should be specifically spelled out in the regulations to avoid any confusion

FINAL:

The mentor/protégé program is designed to encourage approved mentors to provide various forms of business development assistance to protégé firms. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing prime contracts with the Government in the form of joint venture arrangements. The purpose of the mentor/protégé relationship is to enhance the capabilities of the protégé and to improve its ability to successfully compete for contracts. The purpose of the mentor/protégé relationship is to enhance the capabilities of the protégé, assist the protégé with meeting the goals established in its SBA-approved business plan, and to improve its ability to successfully compete for contracts.

Mentors

Any concern or non-profit entity that demonstrates a commitment and the ability to assist developing 8(a) Participants may act as a mentor and receive benefits as set forth in this section. This includes businesses that have graduated from the 8(a) BD program, firms that are in the transitional stage of program participation, other small businesses, and large businesses.

In order to qualify as a mentor, a concern must demonstrate that it:

- 1) Possesses favorable financial health;
- 2) Possesses good character;
- 3) Does not appear on the federal list of debarred or suspended contractors; and
- 4) Can impart value to a protégé firm due to lessons learned and practical experience gained because of the 8(a) BD program, or through knowledge of general business operations and government contracting.

Generally a mentor will have no more than one protégé at a time. However, the AA/BD may authorize a concern or non-profit entity to mentor more than one protégé at a time where it can demonstrate that the additional mentor/protégé relationship will not adversely affect the development of either protégé firm (e.g., the second firm may not be a competitor of the first firm).

Under no circumstances will a mentor be permitted to have more than three protégés at one time.

In order to demonstrate its favorable financial health, a firm seeking to be a mentor must submit to SBA for review copies of the federal tax returns it submitted to the IRS, or audited financial statements, including any notes, or in the case of publicly traded concerns the filings required by the Securities and Exchange Commission for the past three years.

Once approved, a mentor must annually certify that it continues to possess good character and a favorable financial position.

Protégés

In order to initially qualify as a protégé firm, a Participant must:

- 1) Be in the developmental stage of program participation; or
- 2) Have never received an 8(a) contract; or
- 3) Have a size that is less than half the size standard corresponding to its primary NAICS code.

Only firms that are in good standing in the 8(a) BD program (e.g., firms that do not have termination or suspension proceedings against them, and are up to date with all reporting requirements) may qualify as a protégé.

A protégé firm may generally have only one mentor at a time. The AA/BD may approve a second mentor for a particular protégé firm where (i) the second relationship pertains to an unrelated, secondary NAICS code; (ii) the protégé firm is seeking to acquire a specific expertise that the first mentor does not possess; and (iii) the second relationship will not compete or otherwise conflict with the business development assistance set forth in the first mentor/protégé relationship.

A protégé may not become a mentor and retain its protégé status. The protégé must terminate its mentor/protégé agreement with its mentor before it will be approved as a mentor to another 8(a) Participant.

SBA will not approve a mentor/protégé relationship for an 8(a) Participant with less than six months remaining in its program term.

Benefits

A mentor and protégé may joint venture as a small business for any government prime contract or subcontract, including procurements with a dollar value less than half the size standard corresponding to the assigned NAICS code and 8(a) sole source contracts, provided the protégé qualifies as small for the procurement and, for purposes of 8(a) sole source requirements, the protégé has not reached the dollar limit set forth in § 124.519.

SBA must approve the mentor/protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation.

In order to receive the exclusion from affiliation for both 8(a) and non-8(a) procurements, the joint venture must meet the requirements set forth in § 124.513(c).

Once a protégé firm graduates from or otherwise leaves the 8(a) BD program, it will not be eligible for any further benefits from its mentor/protégé relationship (i.e., the receipts and/or employees of the protégé and mentor will generally be aggregated in determining size for any joint venture between the mentor and protégé after the protégé leaves the 8(a) BD program). Leaving the 8(a) BD program, or terminating the mentor/protégé relationship while a protégé firm is still in the program, does not, however, affect contracts previously awarded to a joint venture between the protégé and its mentor. In such a case, the joint venture continues to qualify as small for previously awarded contracts and is obligated to continue performance on those contracts.

Notwithstanding the requirements set forth in §§124.105(g) and (h), in order to raise capital for the protégé firm, the mentor may own an equity interest of up to 40% in the protégé firm.

Notwithstanding the mentor/protégé relationship, a protégé firm may qualify for other assistance as a small business, including SBA financial assistance.

No determination of affiliation or control may be found between a protégé firm and its mentor based on the mentor/protégé agreement or any assistance provided pursuant to the agreement.

Written Agreement

The mentor and protégé firms must enter a written agreement setting forth an assessment of the protégé's needs and providing a detailed description and timeline for the delivery of the assistance the mentor commits to provide to address those needs (e.g., management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor).

The mentor/protégé agreement must:

- 1) Address how the assistance to be provided through the agreement will help the protégé firm meet the goals established in its SBA-approved business plan;
- 2) Establish a single point of contact in the mentor concern who is responsible for managing and implementing the mentor/protégé agreement; and
- 3) Provide that the mentor will provide such assistance to the protégé firm for at least one year.

The written agreement must be approved by the AA/BD. The agreement will not be approved if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, or if SBA determines that the agreement is merely a vehicle to enable the mentor to receive 8(a) contracts.

The agreement must provide that either the protégé or the mentor may terminate the agreement with 30 days advance notice to the other party to the mentor/protégé relationship and to SBA.

SBA will review the mentor/protege relationship annually to determine whether to approve its continuation for another year.

SBA must approve all changes to a mentor/protege agreement in advance.

Decision to Decline Mentor/Protégé Relationship

Where SBA declines to approve a specific mentor/protégé agreement, the protégé may request the AA/BD to reconsider the Agency's initial decline decision by filing a request for reconsideration with its servicing SBA district office within 45 calendar days of receiving notice that its mentor/protégé agreement was declined. The protégé may revise the proposed mentor/protégé agreement and provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline to its servicing district office.

The AA/BD will issue a written decision within 45 calendar days of receipt of the protégé's request. The AA/BD may approve the mentor/protégé agreement, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the AA/BD will explain why the mentor/protégé agreement does not meet the requirements of § 124.520 and give specific reasons for the decline.

If the AA/BD declines the mentor/protégé agreement solely on issues not raised in the initial decline, the protégé can ask for reconsideration as if it were an initial decline.

If SBA's final decision is to decline a specific mentor/protégé agreement, the 8(a) firm seeking to be a protégé cannot attempt to enter another mentor/protégé relationship with the same mentor for a period of 60 calendar days from the date of the final decision. The 8(a) firm may, however, submit another proposed mentor/protégé agreement with a different proposed mentor at any time after the SBA's final decline decision.

Evaluating the Mentor/Protege Relationship

In its annual business plan update required by §124.403(a,) the protege must report to SBA for the protégé's preceding program year:

- 1) All technical and/or management assistance provided by the mentor to the protege;
- 2) All loans to and/or equity investments made by the mentor in the protege;
- 3) All subcontracts awarded to the protege by the mentor, and the value of each subcontract;
- 4) All federal contracts awarded to the mentor/protege relationship as a joint venture (designating each as an 8(a), small business set aside, or unrestricted procurement), the value of each contract, and the percentage of the contract performed and the percentage of revenue accruing to each party to the joint venture; and
- 5) A narrative describing the success such assistance has had in addressing the developmental needs of the protege and addressing any problems encountered.

The protégé must report the mentoring services it receives by category and hours.

The protege must annually certify to SBA whether there has been any change in the terms of the agreement.

SBA will review the protégé's report on the mentor/protege relationship as part of its annual review of the firm's business plan pursuant to §124.403. SBA may decide not to approve continuation of the agreement if it finds that the mentor has not provided the assistance set forth in the mentor/protege agreement or that the assistance has not resulted in any material benefits or developmental gains to the protege.

Consequences of Not Providing Assistance Set Forth in the Mentor/Protégé Agreement

Where SBA determines that a mentor has not provided to the protégé firm the business development assistance set forth in its mentor/protégé agreement, SBA will notify the mentor of such determination and afford the mentor an opportunity to respond. The mentor must respond within 30 days of the notification, explaining why it has not provided the agreed upon assistance and setting forth a definitive plan as to when it will provide such assistance.

If the mentor fails to respond, does not supply adequate reasons for its failure to provide the agreed upon assistance, or does not set forth a definite plan to provide the assistance:

- 1) SBA will terminate its mentor/protégé agreement;
- 2) The firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor/protégé agreement; and
- 3) SBA may recommend to the relevant procuring agency to issue a stop work order for each federal contract for which the mentor and protégé are performing as a small business joint venture in order to encourage the mentor to comply with its mentor/protégé agreement.
- 4) Where a protégé firm is able to independently complete performance of any such contract, SBA may also authorize a substitution of the protégé firm for the joint venture.

SBA may consider a mentor's failure to comply with the terms and conditions of an SBA-approved mentor/protégé agreement as a basis for debarment on the grounds, including but not limited to, that the mentor has not complied with the terms of a public agreement under 2 C.F.R. § 180.800(b).

REPORTING REQUIREMENT AND SUBMISSION OF FINANCIAL STATEMENTS

CURRENT RULE: § 124.601

PROPOSED RULE:

Amend § 124.601, which addresses a statutorily required reporting requirement for 8(a) Participants. Small business concerns participating in the 8(a) BD program are required by statute to semiannually submit a written report to their assigned BDS that includes a listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than

employees) receiving fees, commissions, or compensation of any kind to assist such participant in obtaining a Federal contract. The previous regulation incorrectly required this report to be submitted annually. This change is needed in order to bring the regulation into compliance with the statutory requirement.

FINAL:

Each Participant must submit semi-annually a written report to its assigned BOS that includes a listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than employees) receiving fees, commissions, or compensation of any kind to assist such Participant in obtaining or seeking to obtain a Federal contract. The listing must indicate the amount of compensation paid and a description of the activities performed for such compensation.

CURRENT RULE: § 124.602

PROPOSED RULE:

Increase the level of receipts firms must have before they are required to provide audited and reviewed financial statements to SBA. (audited: from greater than \$5 million in receipts to greater than \$10 million in receipts; reviewed: from between \$1 million and \$5 million in receipts to between \$2 million and \$10 million in receipts)

As the cost for audited and reviewed financial statements increases, those costs are becoming more of a burden on developing disadvantaged small businesses.

FINAL:

SBA has added a provision to the regulations allowing 8(a) Participants to provide an audited balance sheet for the first year an audit is required, with the income and cash flow statements receiving the level of service required for the previous year (review or none, depending on sales the year before the audit is required).

The final rule adds a waiver for reviewed financial statements to § 124.602(b)(2). If a waiver is granted, the Participant would be permitted to submit a compilation statement instead of reviewed financial statements.

SMALL DISADVANTAGED BUSINESS CERTIFICATION RULES

CURRENT RULE: § 124.1002

PROPOSED RULE:

Amend the eligibility requirements for the SDB program to make it clear that the “other eligibility requirements” set forth in § 124.108 for 8(a) BD program participation do not apply to SDB certification.

Amend the eligibility requirements for the SDB program to define full time management as it applies to the SDB program.

The SDB program is not a business development program. Disadvantaged individuals may operate part-time businesses.

FINAL:

Additional Eligibility Criteria

Except for tribes, ANCs, CDCs, and NHOs, each individual claiming disadvantaged status must be a citizen of the United States.

The other eligibility requirements set forth in § 124.108 for 8(a) BD program participation do not apply to SDB eligibility.

Full-Time Requirement for SDB Purposes

An SDB is considered to be managed on a full-time basis by a disadvantaged individual if such individual works for the concern during all of the hours the concern operates. For example, if a concern operates 20 hours per week and the disadvantaged manager works for the firm during those twenty hours, that individual will be considered as working full time for the firm.